No. 99-603

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LEGAL SERVICES CORPORATION,

Petitioner,

UNITED STATES OF AMERICA,

Intervenor,

—v.—

CARMEN VELAZQUEZ; WEP WORKERS TOGETHER!; COMMUNITY SERVICE SOCIETY OF NEW YORK, INC.; NEW YORK CITY COALITION TO END LEAD POISONING; CENTRO INDEPENDIENTE

(Caption continued on inside front cover)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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DE TRABAJADORES AGRICOLAS, INC.; GREATER NEW YORK LABOR-RELIGION COALITION, on behalf of all similarly situated individuals, organizations and their members, namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub. L. 104-208; FARMWORKERS LEGAL SERVICES OF NEW YORK, INC., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub. L. 104-208; PEGGY EARISMAN; OLIVE KAREN STAMM; JEANETTE ZELHOF; ELISABETH BENJAMIN; JILL ANN BOSKEY; LAUREN SHAPIRO, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub. L. 104-208; and; ANDREW J. CONNICK; C. VIRGINIA FIELDS, Manhattan Borough President; GUILLERMO LINARES, Councilmember; STANLEY MICHELS, Councilmember; ADAM CLAYTON POWELL, JR. IV, Councilmember; LAWRENCE SEABROOK, Senator; SCOTT M. STRINGER, Assemblyman, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private non-federal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub. L. 104-208,

Respondents.

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ARGUMENT

Legal Services Corporation ("LSC") respectfully submits this Reply Brief in further support of its petition for a writ of certiorari to review that portion of the judgment of the United States Court of Appeals for the Second Circuit that invalidated a single provision of the LSC enabling statute, as amended in 1996. That provision (the "suit-for-benefits limitation") prohibits LSC-funded lawyers from participating in litigation, lobbying or rulemaking "involving an effort to reform a Federal or State welfare system."

As LSC previously explained in detail in its Petition, the court of appeals' invalidation of the suit-for-benefits limitation conflicts with this Court's ruling in *Rust v. Sullivan*, 500 U.S. 173 (1991). As LSC also previously explained, and as Justice White, writing for a unanimous panel in *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) ("*LASH III*") concluded, the case of *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) is utterly irrelevant to the determination of this issue. *See* Petition at 13-20. LSC will therefore not repeat those arguments here. Rather, pursuant to Rule 15.6 of the Rules of this Court, LSC will only address in this brief "new points raised in the brief in opposition" that was filed by Respondents on March 1, 2000. As LSC demonstrates below, the arguments raised by Respondents are without merit and do not warrant the denial of LSC's Petition.

A. The Constitutional Basis For The Second Circuit's Ruling On The Suit-For-Benefits Limitation Must Be Reviewed

Contrary to Respondents' suggestion, the principle of "constitutional avoidance" does not preclude the review of the court of appeals' First Amendment analysis of the suit-for-benefits limitation.

1. LSC's Program-Integrity Regulations Are Entitled To Full *Chevron* Deference

The first "alternative" non-constitutional grounds for affirmance offered by Respondents is that the program-integrity regulations promulgated by LSC[1] are an invalid interpretation of the 1996 Act, and that, in the absence of the regulations, the statute is unconstitutional. Respondents made this same argument in the court of appeals, which held that LSC is entitled to the full measure of deference under this Court's ruling in *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984) and flatly rejected Respondents' statutory attack on the validity of the program-integrity regulations. *See* App. 11a-13a.

2. Respondents' "Ethics" Argument Is Not Properly Raised For The First Time In This Court

The second "alternative" grounds Respondents offer for affirming the ruling on the suit-for-benefits limitation is that LSC-funded lawyers are, in fact, not prohibited from contesting the constitutionality or legality of welfare laws when failing to do so would violate the Canon of Ethics.

Respondents failed to raise this argument in the court of appeals (or, for that matter, in the district court). Accordingly, they may not raise it now for the first time. *See Federal Trade Commission v. Grolier Inc.*, 462 U.S. 19, 23, n. 6 (1983) ("Respondent did not raise this issue before the District Court or the Court of Appeals and we decline to address it"); *Jenkins v. Anderson*, 447 U.S. 231, 234, n.1 (1980) (Court refuses to consider argument that Respondent failed to raise in the courts below).

In any event, Respondents are wrong. Respondents hypothesize that in undertaking to represent a new client

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[1] These regulations are set forth at App. 112a-132a.

who wishes to challenge an existing welfare law, a conflict will arise between the lawyer's ethical duties and the suit-for-benefits limitation, and that the attorney will therefore have to undertake and continue the representation. In fact, the authority they cite for this proposition—an ethics opinion of the American Bar Association[2]—says no such thing.

What that opinion does say is that an LSC-funded lawyer who is considering undertaking a new representation should disclose to the client the limits on the prospective representation imposed by the 1996 Act and secure an agreement from the client that the lawyer will withdraw from the case if it becomes necessary to raise an argument that is covered by those limitations. The opinion notes that "[s]uch a limitation [on the scope of representation] is similar to other status regulations, such as income level requirements, that legal services organizations currently have in force." Finally, the opinion states the if the LSC-funded lawyer concludes that the limitations on the scope of the representation "would seriously compromise his (sic) duties to the client, she should not ask the client to accept such a restriction, but she should decline the representation . . ."

Thus, there is no support for Respondents' assertion that LSC Act and the Canon of Ethics, read together, permit an LSC-funded lawyer to challenge a welfare statute and still remain in the LSC program.

B. The Second Circuit's Ruling Conflicts With The Decision Of The Ninth Circuit

As we previously explained (Petition at 20-21), one reason for granting certiorari is that the court of appeals' rul-

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[2] ABA Comm. On Ethics and Professional Responsibility, Formal Op. 96-399 (1996).

ing on the suit-for-benefits limitation conflicts with that of the Court of Appeals for the Ninth Circuit in *LASH III*.

Respondents claim that there is no conflict because the plaintiffs in *LASH III* attacked the 1996 Act "only insofar as it limited the use of non-federal funds by Legal Services grantees; they disclaimed any challenge to restrictions imposed upon LSC-funded attorneys who are paid out of federal funds. *The instant suit raises this unaddressed issue*." Respondents' Brief at 11-12 (emphasis added).

Respondents' argument is disingenuous at best. While it is true that the Amended Complaint challenges the restrictions imposed upon both federal and non-federal funds, in their motion for a preliminary injunction—which was the issue taken up on appeal—Respondents only challenged the restrictions on non-federal funds. JA at 130 (Notice of Motion).[3] Respondents reiterated this point in footnote 16 of their appeal brief ("[P]laintiffs seek preliminary injunctive relief *only in connection with the use of non-federal funds*") (emphasis added). Indeed, the court of appeals understood this to be the scope of the challenge to the 1996 Act that was before it. *See* App. 6a ("Plaintiffs sought a preliminary injunction only to enjoin the restrictions on the use of non-federal funds.")

Thus, contrary to Respondents' assertion, the rulings of the Courts of Appeal for the Second and Ninth Circuits with respect to the suit-for-benefits limitation are in conflict, and the petition should be granted in order to resolve this conflict.

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[3] References to "JA" are to the Joint Appendix submitted in connection with the appeal below.

C. Respondents' Separation Of Powers Argument Is Not Properly Raised For The First Time In This Court

Respondents' last stab at supporting the court of appeals' decision is to argue that the suit-for-benefits limitation violates the separation of powers doctrine because the restrictions are an improper attempt by Congress to prevent the courts from deciding cases. Once again, Respondents may not raise this argument now because they did not raise it below. *See Grolier*, 462 U.S. at 23, n. 6; *Jenkins*, 447 U.S. at 234, n.1.

In any event, this argument is absurd. Under Respondents' theory, once the LSC program was created, *any* subsequent restrictions on the program, or indeed, a decision by Congress to merely reduce funding for the program—would violate the separation of powers doctrine.

D. There Is No Reason To Grant Respondents' Petition

Finally, Respondents argue that if this Court grants LSC's Petition, it should also grant the Petition that they filed (*Velazquez et al. v. Legal Services Corp.*, (Docket No. 99-604)) and review that portion of the judgment in which the court of appeals unanimously upheld the constitutionality of the remaining provisions of the 1996 Act and implementing regulations. This attempted linkage should be rejected. As LSC explained in its brief in opposition to the *Velazquez* petition, that part of the judgment is fully consistent with this Court's prior decisions as well as with the Ninth Circuit's decision in *LASH III*. Accordingly, under this Court's well established rules, there is no basis for granting the *Velazquez* petition.

CONCLUSION

For the reasons set forth above and in LSC's Petition, LSC's Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
March 13, 2000

Respectfully submitted,

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